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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

<sup>an individual</sup>  
JULIUS FRANCISCO, on behalf of <sup>SMO</sup>  
himself, and on behalf of all persons  
similarly situated,

Plaintiffs,

vs.

DIEBOLD, INCORPORATED, an Ohio  
Corporation,

Defendants.

**'09 CV 1889 WQH WMC**  
CASE No. \_\_\_\_\_

COMPLAINT FOR DAMAGES,  
RESTITUTION, AND INJUNCTIVE  
RELIEF:

(1) UNFAIR COMPETITION IN  
VIOLATION OF CAL. BUS. & PROF.  
CODE § 17200 *et seq.*;

(2) FAILURE TO PAY EARNED  
WAGES AND OVERTIME  
COMPENSATION IN VIOLATION OF  
CAL. LAB. CODE §§ 204, 210, 218,  
510, 1194 AND 1198;

(3) FAILURE TO PROVIDE  
ACCURATE ITEMIZED STATEMENTS  
IN VIOLATION OF LABOR CODE §  
226; and,

(4) VIOLATION OF FAIR LABOR  
STANDARDS ACT [29 U.S.C. § 216]

DEMAND FOR A JURY TRIAL

## INTRODUCTION

1  
2       1.     This class action is brought by Plaintiff Julius Francisco ("PLAINTIFF")  
3 individually and on behalf of present and former employees of DIEBOLD,  
4 INCORPORATED (referred to herein as "DEFENDANT" or "DIEBOLD") in California  
5 during the Class Period. As an employer of technicians, DEFENDANT failed to correctly  
6 calculate the overtime rate for PLAINTIFF and other similarly situated technician  
7 employees because DEFENDANT excluded the on-call stipend paid to these employees  
8 from the regular rate calculation, and as a result, these employees were uniformly underpaid  
9 for documented overtime work and therefore did not receive all of the overtime  
10 compensation to which they were entitled by law. DEFENDANT also systematically failed  
11 to pay PLAINTIFF and other similarly situated employees for the actual numbers of hours  
12 worked, regular and/or overtime, during the Class Period. These employees were placed  
13 onto standby, on-call duty but were not paid the required compensation for these hours  
14 worked, regular and/or overtime, during the Class Period. DIEBOLD's on-call policies  
15 require these employees to remain in the assigned geographic vicinity, usually in their work  
16 vehicle, and be available to respond by traveling to the client location immediately after  
17 being called and resolve of the client issue, from 9:00 a.m to 12:00 a.m. for an entire week  
18 out of every 2 to 3 weeks, without compensation for all of the standby on-call hours worked.  
19 As a result, PLAINTIFF and other employees did not receive compensation for all hours  
20 worked, including but not limited to the overtime hours worked. Finally, the wage  
21 statements and DEFENDANT's practices with respect to such wage statements issued to  
22 PLAINTIFF and other similarly situated employees violate California law, and in particular,  
23 Labor Code § 226. The policies and practices of DEFENDANT alleged herein constitute  
24 deceptive, unfair and/or unlawful business practices whereby DEFENDANT retained wages  
25 due PLAINTIFF and other similarly situated employees for all hours worked. PLAINTIFF  
26 seeks an injunction under Business & Professions Code § 17203 enjoining such conduct by  
27 DEFENDANT in the future, relief for the named PLAINTIFF and other similarly situated  
28 employees as set forth herein below, and all other appropriate equitable and legal relief.

1           2. Defendant DIEBOLD, INCORPORATED is a corporation with headquarters  
2 in Ohio. DIEBOLD, INCORPORATED conducts business under the name "Diebold," and  
3 is collectively referred to herein as "DIEBOLD." DIEBOLD is engaged in the business of  
4 providing banking, ATM, security, alarm and other services to financial, retail, business, and  
5 government customers throughout California and the United States. Specifically, DIEBOLD  
6 provides equipment and technology to these companies as well as installation, repair, and  
7 maintenance services for such equipment and technology throughout California, including in  
8 San Diego County, Los Angeles County, Orange County, Santa Clara County, San Mateo  
9 County and Alameda County, where members of the Class alleged herein work and reside.  
10 DIEBOLD employs a workforce of more than 17,000 worldwide and last year generated  
11 consolidated operating revenues of more than \$3 billion. DIEBOLD's service organization  
12 includes nearly 3,400 technicians in the United States. Each year, these technicians deliver  
13 service to customers in the financial, retail, government, commercial, education and  
14 healthcare industries.

15           3. DIEBOLD conducted and continues to conduct substantial and regular  
16 business throughout California and also is an enterprise that affects commerce by engaging  
17 in the enterprise of engaging in nationwide communications through interstate commerce  
18 and by regularly and recurrently receiving or transmitting interstate communications.

19           4. DIEBOLD, based and incorporated in Ohio, was formed in 1859 and trades on  
20 the New York Stock Exchange (NYSE) under the DBD symbol. DIEBOLD began as a safe  
21 and lock company. In more recent years, DIEBOLD developed early concept automated  
22 teller machines (ATM). Today, DIEBOLD is a global leader in providing integrated  
23 self-service delivery and security systems and services. DIEBOLD's primary business is to  
24 provide security and outsourcing services to financial institutions, which DIEBOLD  
25 describes as follows: "Diebold's outsourcing solution arrangement provides a mix of  
26 technology to make financial institutions more efficient, including self-service devices,  
27 deposit automation, security, cash management, debit card processing, software deployment,  
28 network management and monitoring, break-fix services, site management, content

1 distribution, configuration management and more.”

2         5.       DIEBOLD has been delivering security products and services for 150 years.  
3 Recognized as an industry innovator and leader, DIEBOLD delivers approaches to  
4 safeguarding, money, people and institutions via safes, vaults and technology-based  
5 integrated systems. DIEBOLD continues to have a nationwide presence in security and  
6 financial services, servicing alarms and ATMs for most major banks in the United States.  
7 To provide these products and services, DIEBOLD employs a fleet of technicians who  
8 remain in the field and on-call to immediately respond to issues as directed by DIEBOLD.  
9 These technician employees bear the slogan “we never rest” on their vehicles.

10  
11   CONDUCT

12         6.       DIEBOLD’s business involves the providing of providing products and  
13 services relating to ATMs, financial marketplace, and retailers. These products and services  
14 include security equipment, alarm equipment, ATM equipment, banking equipment, and the  
15 installation, repair, maintenance and servicing of these products. In order to provide these  
16 continuous services, DIEBOLD employs a staff who maintain the hardware, software,  
17 ATMS and security equipment for DIEBOLD and DIEBOLD’s clients. DIEBOLD requires  
18 this technician staff to work at all hours of the night and day to keep the services operation  
19 and to resolve problems immediately. As a result, these non-exempt technician employees  
20 are required to remain on-call standby. DEFENDANT’s on-call policies require these  
21 employees to remain in the assigned geographic vicinity, usually in their work vehicle, and  
22 be available to respond by traveling to the client location immediately after being called and  
23 resolve of the client issue during the time scheduled by DIEBOLD. These requirements so  
24 restrict and control the employee, that these employees are unable to engage in any private  
25 pursuits and must remain in the assigned geographic location under the complete control of  
26 DIEBOLD, usually in their company vehicle, awaiting directions from DIEBOLD.  
27 DIEBOLD does not pay for the stand-by hours worked remaining on-call, without  
28 compensation for all of the standby on-call hours worked.

1           7.     The non-exempt employees in technician positions performing services in the  
2 field have been given titles by DEFENDANT like “field technician”, “service technician”,  
3 “technician”, “service engineers”, “service professional”, “customer service engineer”, or  
4 “installation and customer solution engineers”. Collectively, employees in these positions  
5 are referred to in this Complaint as “technicians” or “technician employees.”

6           8.     The duties that are performed by these technician employees primarily involve  
7 the day to day labor to maintain, repair, troubleshoot, build and monitor equipment for  
8 DEFENDANT and DEFENDANT’s clients. The duties for these employees also require  
9 performance of non-office, manual labor, including but not limited to carrying, lifting,  
10 bending and repairing, and the physical installation and maintenance of security, computer,  
11 electrical, software, and/or hardware components and parts. As a matter of course, technical  
12 problems often arise with this equipment at all hours of the day and at all hours of the night.  
13 Responding to these problems and maintenance demands are not only performed throughout  
14 the normal workday, but also pursuant to an on-call policy imposed by DEFENDANT by  
15 which these employees were and still are responsible to respond to calls and perform  
16 troubleshooting work to resolve the problems at issue during specified on-call work hours.  
17 All of these job duties performed by the technicians are non-exempt job duties. These  
18 technician employees perform these functions, and all duties, according to established  
19 company policies, protocols, and procedures. This action involves the policies and practices  
20 of DEFENDANT with respect to these technician employees working in the field who are  
21 classified by DEFENDANT as non-exempt and compensated on an hourly basis.

22           9.     Plaintiff Julius Francisco was first employed by DEFENDANT in 1999 and  
23 continued to work for DEFENDANT through September 18, 2006. During the relevant  
24 period, PLAINTIFF is employed by DEFENDANT in a non-exempt technician position with  
25 the title “field technician” and/or “customer service engineer.” Irrespective of the specific  
26 assigned title, all of the technician employees perform the same basic work and are required  
27 to perform standby work in the field at the direction of DIEBOLD. As a non-exempt  
28 technician employee, PLAINTIFF was required to perform standby, on-call work pursuant

1 to DEFENDANT's on-call policies require these employees to remain in the assigned  
2 geographic vicinity, usually in their work vehicle, and be available to respond by traveling to  
3 the client location immediately after being called and resolve of the client issue during the  
4 time scheduled by DIEBOLD, without compensation for all of the standby on-call hours  
5 worked. DIEBOLD instructs these employees to only record hours worked for time when  
6 they are responding to a call, and to exclude time spent waiting in a geographic location  
7 under the complete control of DIEBOLD. In the case of PLAINTIFF, he was required to  
8 remain in an assigned location in his company vehicle to respond to issues for 9:00 a.m to  
9 12:00 a.m. every day, for an entire week out of every 2 to 3 weeks, without compensation  
10 for all of the standby on-call hours worked. As a result, DEFENDANT as a matter of  
11 consistent policy and practice failed to pay PLAINTIFF for the hours spent under the control  
12 of DEFENDANT on performing standby, on-call work during the Class Period. As a result,  
13 PLAINTIFF did not receive compensation for all hours worked, including but not limited to  
14 the overtime hours worked. Like of the other similarly situated non-exempt Technician  
15 employees, PLAINTIFF was uniformly underpaid for overtime work and therefore did not  
16 receive all of the overtime compensation to which he were entitled because DEFENDANT  
17 excluded the on-call stipend paid to PLAINTIFF from the regular rate calculation. Finally,  
18 the wage statements received by PLAINTIFF from DEFENDANT failed to contain all of the  
19 required information in violation of Labor Code § 226(a) and DEFENDANT has a policy  
20 which denies employees the right to inspect wage statements from prior pay periods in  
21 violation of labor Code § 226(b) and (c).

22       10. The work schedule and on-call schedule for PLAINTIFF and other technician  
23 employees is dictated by the general management of DIEBOLD to which they directly  
24 report, and the demands of work. The on-call schedule for PLAINTIFF is twenty-four  
25 hours a day during both the week and weekends, every other week. The on-call standby  
26 schedule for the technician employees is documented in the DEFENDANT's payroll  
27 records.



1           11. For all of these hours of on-call stand-by work, PLAINTIFF and other  
2 technician employees only receive a stipend equal to one hour regular compensation,  
3 regardless of the number of hours worked. This stipend amount is not sufficient to  
4 compensate these employees for the on-call hours worked. Further, DEFENDANT  
5 uniformly excludes the stipend amount from the regular rate calculation and thereby  
6 systematically underpays the overtime compensation paid to these employees. The records  
7 of the DEFENDANT will evidence the on-call work, the stipend payments and the  
8 corresponding underpayment of overtime compensation during that workweek.

9           12. PLAINTIFF and the other technician employees were and are employed as  
10 working members of the production side of DEFENDANT's business. The primary job  
11 duties of PLAINTIFF and Technician staff employees were and are to troubleshoot, repair,  
12 configure, maintain equipment of DEFENDANT and DEFENDANT's clients, using manual  
13 labor and technician skills, at locations designed by DEFENDANT. As a result,  
14 PLAINTIFF and the other non-exempt technician employees were not and currently are not  
15 primarily involved in providing office or non-manual work directly related to the  
16 management policies or general business operations with respect to matters of significance.  
17 The work of PLAINTIFF and the other non-exempt technician employees also does not  
18 involve specialized or technical work that requires special training, experience or  
19 knowledge. The work of PLAINTIFF and other non-exempt technician employees also does  
20 not involve the management of the banking enterprise or the banking location and these  
21 employees do not customarily and regularly exercises discretion and independent judgment.  
22 Instead, PLAINTIFF and the other non-exempt technician employees were and currently are  
23 primarily involved in providing day to day, routine, and general, manual labor related to the  
24 production and delivery of DEFENDANT's business products. Physical demands of the  
25 position include standing, sitting, walking, bending, counting, checking, talking, and  
26 installing products.

27           13. DEFENDANT's unlawful, unfair, and deceptive employment and wage  
28

1 practices cheat the PLAINTIFF and the other technician employees out of their lawful  
2 wages due for all hours worked as required by California and federal law and systematically  
3 underpays these employees overtime compensation as a result of the exclusion of the stipend  
4 from the calculation.

5 14. PLAINTIFF brings this class action on behalf of himself and a Class  
6 consisting of all individuals who are or previously were employed by DEFENDANT as a  
7 technician in California that was classified by DEFENDANT as non-exempt, and who were  
8 scheduled for on-call, standby work (the "CLASS") during the CLASS PERIOD. The class  
9 period applicable to this CLASS is defined as the period beginning four years prior to the  
10 filing of this Complaint and ending on the date of as determined by the Court (the "CLASS  
11 PERIOD"). As a matter of company policy and practice, DEFENDANT classified every  
12 member of the CLASS as non-exempt and paid them on an hourly basis, but failed to pay the  
13 required straight and overtime compensation due these employees for all hours worked due  
14 to the exclusion of standby work and the miscalculation of the required overtime rate, and  
15 otherwise failed to comply with all labor laws with respect to these employees.

16 15. Individuals in the CLASS are and were employees who are entitled to regular,  
17 and overtime compensation and prompt payment of amounts that the employer owes an  
18 employee when the employee quits or is terminated, and other compensation and working  
19 conditions that are prescribed by law. Although DEFENDANT required the employees in  
20 the CLASS to work more than forty (40) hours a week, eight (8) hours in a workday, and /or  
21 on the seventh (7<sup>th</sup>) day of a workweek, as a matter of company policy and practice,  
22 DEFENDANT consistently and uniformly failed and still fails to implement a practice and  
23 procedure that compensates for all hours worked by these employees, including on-call time,  
24 and fails to correctly pay the overtime compensation due for documented overtime as a  
25 result of the exclusion of the on-call stipend compensation from the overtime calculation.  
26 The PLAINTIFF and members of the CLASS currently work or previously worked in  
27 California at times during the CLASS PERIOD for DEFENDANT and DEFENDANT's  
28 practices and procedures as alleged herein are and were common throughout California at all



1 relevant times.

2       16. In this action, PLAINTIFF, on behalf of himself and the CLASS, seeks to  
3 recover all the money that DEFENDANT was required by law to pay, but failed to pay, to  
4 PLAINTIFF and all other CLASS members for work performed. PLAINTIFF also seeks  
5 penalties and all other relief available to him and other similarly situated employees under  
6 California law. PLAINTIFF and many of the CLASS members have terminated their  
7 employment and DEFENDANT did not timely tender payment of all wages owed as  
8 required by Cal. Labor Code §§ 201 and 202. Therefore, as provided by Cal Lab. Code §  
9 203, on behalf of the members of the CLASS who have terminated their employment,  
10 including himself, PLAINTIFF demands thirty days of pay as penalty for not paying all  
11 wages due at time of termination for all employees who terminated employment during the  
12 CLASS PERIOD and demands an accounting and payment of all wages due, plus interest.

13       17. PLAINTIFF and all members of the CLASS are and were classified under  
14 Industrial Welfare Commission Wage Order 1-2001 and Cal. Lab. Code §§ 510 *et seq.* and  
15 Section 13(a)(5) of the Fair Labor Standards Act (the "FLSA") as non-exempt from  
16 applicable federal and state labor laws and were paid hourly compensation. Under both the  
17 FLSA and California Labor Law, these employees may only be classified as exempt if the  
18 employee primarily engages in duties and responsibilities involving (i) the "performance of  
19 office or non-manual work directly related to management policies or general business  
20 operations" of BANK OF AMERICA, (ii) the customary and regular exercising of discretion  
21 and independent judgment, (iii) performed only under general supervision work along  
22 specialized or technical lines requiring special training, experience, or knowledge, and (iv) is  
23 paid a monthly salary equivalent to two times the minimum wage for full-time employment.  
24 PLAINTIFF and the other members of the CLASS do not meet all of these requirements.  
25 As a result of the DEFENDANT's consistent policy and practice as herein alleged,  
26 DEFENDANT failed and still fail to pay overtime and other required compensation in  
27 accordance with applicable law.

28       18. By reason of this uniform conduct applicable to PLAINTIFF and all

1 members of the CLASS, DEFENDANT committed acts of unfair competition in violation of  
2 the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (the "UCL"), by  
3 engaging in a company-wide policy and procedure which failed to correctly pay the  
4 PLAINTIFF, the CLASS of similarly situated employees all compensation required for all  
5 hours worked. As a result of DEFENDANT's willful and intentional disregard of the  
6 obligation to include all earnings in the calculation of overtime compensation,  
7 DEFENDANT failed to properly pay all required overtime compensation for work  
8 performed by the members of the CLASS and violated the FLSA and the California Labor  
9 Code and regulations promulgated thereunder as herein alleged.

10 19. PLAINTIFF and the members of the CLASS have no plain, speedy or  
11 adequate remedy at law and will suffer irreparable injury if DEFENDANT is permitted to  
12 continue to engage in the unlawful acts and practices herein alleged. The illegal conduct  
13 alleged herein is continuing and to prevent future injury and losses, and to avoid a  
14 multiplicity of lawsuits, PLAINTIFF is entitled to an injunction and other equitable relief,  
15 on behalf of himself and the CLASS, to prevent and enjoin such practices. Pursuant to  
16 Business & Professions Code § 17203, PLAINTIFF therefore requests a preliminary and/or  
17 permanent injunction as the DEFENDANT provides no indication that DEFENDANT will  
18 not continue such wrongful activity in the future, along with restitution, penalties, interest,  
19 compensation and other equitable relief as provided by law.

### 20 THE CLASS

21  
22 20. PLAINTIFF brings this class action on behalf of himself and a Class  
23 consisting of all individuals who are or previously were employed by DEFENDANT as a  
24 technician employee in California that was classified by DEFENDANT as non-exempt and  
25 who were scheduled for on-call, standby work (the "CLASS") during the CLASS PERIOD.  
26 To the extent equitable tolling operates to toll claims by the CLASS against DEFENDANT,  
27 the CLASS PERIOD should be adjusted accordingly.

28 21. The California Legislature has commanded that "all wages... ..earned by any

1 person in any employment are due and payable twice during each calendar month, on days  
2 designated in advance by the employer as the regular paydays”, and further that “[a]ny  
3 work in excess of eight hours in one workday and any work in excess of 40 hours in any one  
4 workweek...shall be compensated at the rate of no less than one and one-half times the  
5 regular rate of pay for an employee.” (Lab. Code §204 and §510(a).) The Industrial  
6 Welfare Commission (IWC), however, is statutorily authorized to “establish exemptions  
7 from the requirement that an overtime rate of compensation be paid... ..for executive,  
8 administrative, and professional employees, provided [inter alia] that the employee is  
9 primarily engaged in duties that meet the test of the exemption, [and] customarily and  
10 regularly exercises discretion and independent judgment in performing those duties...” (Lab.  
11 Code §510(a).) Neither the PLAINTIFF nor the other members of the CLASS qualify for  
12 exemption from the above requirements.

13       22. DEFENDANT, as a matter of company policy, practice and procedure, and  
14 in violation of the applicable Labor Code, Industrial Welfare Commission (“IWC”) Wage  
15 Order Requirements, and the applicable provisions of California law, intentionally,  
16 knowingly, and wilfully, engaged in a practice whereby DEFENDANT failed to pay for all  
17 hours worked by PLAINTIFF and the other members of the CLASS, and systematically  
18 failed to correctly calculate overtime compensation, even though DEFENDANT enjoyed the  
19 benefit of this work, required employees to perform this work and permitted or suffered to  
20 permit this overtime work.

21       23. DEFENDANT has the legal burden to establish that each and every non-  
22 exempt employee is paid for all hours worked and to accurately record all hours worked by  
23 non-exempt employees. The DEFENDANT, however, as a matter of uniform and  
24 systematic policy and procedure failed to have in place during the CLASS PERIOD and still  
25 fail to have in place a policy or practice to accurately record hours worked, including on-call  
26 hours, so as to satisfy their burden. This common business practice applicable to each and  
27 every CLASS member can be adjudicated on a class-wide basis as unlawful, unfair, and/or  
28 deceptive under Cal. Business & Professions Code §17200, *et seq.* (the “UCL”) as

1 causation, damages, and reliance are not elements of this claim.

2       24. At no time before or during PLAINTIFF's employment with DEFENDANT  
3 was the compensation for any member of the CLASS properly recalculated so as to  
4 compensate the employee for all hours worked, including on-call time, as required by  
5 California Labor Code §§ 204 and 510, *et seq.* At no time before or during PLAINTIFF's  
6 employment with DEFENDANT was the overtime compensation for any member of the  
7 CLASS properly recalculated so as to include all earnings in the overtime compensation  
8 calculation as required by California Labor Code § 510, *et seq.*

9       25. The CLASS, numbering more than 100 members, is so numerous that joinder  
10 of all members of the CLASS is impracticable.

11       26. DEFENDANT uniformly violated the rights of the CLASS under California  
12 law by:

13               (a) Violating the California Unfair Competition Laws, Cal. Bus. & Prof.  
14 Code § 17200, *et seq.*, by unlawfully, unfairly and/or deceptively having in place company  
15 policies, practices and procedures that failed to pay all wages due the CLASS for all hours  
16 worked, including on-call, stand-by time and failed to accurately record all hours worked by  
17 the CLASS, including on-call, stand-by time;

18               (b) Violating the California Unfair Competition Laws, Cal. Bus. & Prof.  
19 Code § 17200, *et seq.*, by unlawfully, unfairly and/or deceptively having in place company  
20 policies, practices and procedures that failed to correctly calculate overtime compensation  
21 due to employees who received a stipend for the documented overtime hours worked;

22               (c) Violating Cal. Lab. Code §510, *et seq.* by failing to pay the correct  
23 overtime pay owed to PLAINTIFF and the members of the CLASS for overtime hours  
24 worked;

25               (d) Violating Cal. Lab. Code § 226 by failing to provide PLAINTIFF and  
26 the members of the CLASS with an accurate itemized statement in writing showing the  
27 gross wages earned, the net wages earned, all applicable hourly rates in effect during the pay  
28 period and the corresponding number of hours worked at each hourly rate by the employee;

1 and,

2 (e) Violating Cal. Lab. Code §§ 210, 202 and 203 by failing to provide  
3 timely payment of all wages owed to the members of the CLASS who failed to receive the  
4 correct overtime wages for hours worked and who have terminated their employment.

5 27. This Class Action meets the statutory prerequisites for the maintenance of a  
6 Class Action as set forth in Federal Rules of Civil Procedure, Rule 23, in that:

7 (a) The persons who comprise the CLASS exceed 100 persons and  
8 are therefore so numerous that the joinder of all such persons is impracticable and the  
9 disposition of their claims as a class will benefit the parties and the Court;

10 (b) Nearly all factual, legal, statutory, declaratory and injunctive  
11 relief issues that are raised in this Complaint are common to the CLASS will apply  
12 uniformly to every member of the CLASS;

13 (c) The claims of the representative PLAINTIFF are typical of the  
14 claims of each member of the CLASS. PLAINTIFF, like all other members of the CLASS,  
15 was and still is a non-exempt employee who was subjected to the DEFENDANT's practice  
16 and policy which failed to pay all wages due the CLASS for all hours worked, including on-  
17 call time, failed to accurately record all hours worked, including on-call time, by the CLASS  
18 and exclude stipend compensation from the regular rate calculation and thereby  
19 systematically underpaid overtime compensation to the CLASS. PLAINTIFF sustained  
20 economic injury as a result of DEFENDANT's employment practices alleged herein.  
21 PLAINTIFF and the members of the CLASS were and are similarly or identically harmed by  
22 the same unlawful, deceptive, unfair and pervasive pattern of misconduct engaged in by  
23 DEFENDANT.

24 (d) The representative PLAINTIFF will fairly and adequately  
25 represent and protect the interest of the CLASS, and has retained counsel who are competent  
26 and experienced in class action litigation. There are no material conflicts between the  
27 claims of the representative PLAINTIFF and the members of the CLASS that would make  
28 class certification inappropriate. Counsel for the CLASS will vigorously assert the claims of

1 all members of the CLASS.

2 28. In addition to meeting the statutory prerequisites to a Class Action, this action  
3 is properly maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule  
4 23, in that:

5 (a) Without class certification and determination of declaratory,  
6 injunctive, statutory and other legal questions within the class format, prosecution of  
7 separate actions by individual members of the CLASS will create the risk of:

8 1) Inconsistent or varying adjudications with respect to  
9 individual members of the CLASS which would establish incompatible standards of conduct  
10 for the parties opposing the CLASS; and/or,

11 2) Adjudication with respect to individual members of the  
12 CLASS which would as a practical matter be dispositive of interests of the other members  
13 not party to the adjudication or substantially impair or impede their ability to protect their  
14 interests.

15 (b) The parties opposing the CLASS have acted or refused to act on  
16 grounds generally applicable to the CLASS, making appropriate class-wide relief with  
17 respect to the CLASS as a whole in that the DEFENDANT uniformly failed to pay all wages  
18 due, including the correct overtime, for all hours worked by the members of the CLASS;

19 1) With respect to the First Cause of Action, the final relief  
20 on behalf of the CLASS sought does not relate exclusively to restitution because through  
21 this claim PLAINTIFF seek declaratory relief holding that the DEFENDANT's policy and  
22 practices constitute unfair competition, along with injunctive relief, and incidental equitable  
23 relief as may be necessary to prevent and remedy the conduct declared to constitute unfair  
24 competition;

25 (c) Common questions of law and fact exist as to the members of  
26 the CLASS, with respect to the practices and violations of California law as listed above,  
27 and predominate over any question affecting only individual members, and a class action is  
28 superior to other available methods for the fair and efficient adjudication of the controversy,



1 including consideration of:

2 1) The interests of the members of the CLASS in  
3 individually controlling the prosecution or defense of separate actions in that the substantial  
4 expense of individual actions will be avoided to recover the relatively small amount of  
5 economic losses sustained by the individual employees when compared to the substantial  
6 expense and burden of individual prosecution of this litigation;

7 2) Class certification will obviate the need for unduly  
8 duplicative litigation that would create the risk of: (a) Inconsistent or varying adjudications  
9 with respect to individual members of the CLASS, which would establish incompatible  
10 standards of conduct for the DEFENDANT; and/or, (b) Adjudications with respect to  
11 individual members of the CLASS would as a practical matter be dispositive of the interests  
12 of the other members not parties to the adjudication or substantially impair or impede their  
13 ability to protect their interests;

14 3) In the context of wage litigation because a substantial  
15 number of individual class members will avoid asserting their legal rights out of fear of  
16 retaliation by DEFENDANT, which may adversely affect an individual's job with  
17 DEFENDANT or with a subsequent employer, the class action is the only means to assert  
18 their claims through a representative; and,

19 4) A class action is superior to other available methods for the fair  
20 and efficient adjudication of this litigation because class treatment will obviate the need for  
21 unduly and unnecessary duplicative litigation that is likely to result in the absence of  
22 certification of this action pursuant to Fed. R. Civ. Proc., rule 23.

23 29. This Court should permit this action to be maintained as a Class Action  
24 pursuant to Federal Rules of Civil Procedure, rule 23, because:

25 (a) The questions of law and fact common to the CLASS  
26 predominate over any question affecting only individual members because the  
27 DEFENDANT's employment practices were uniformly and systematically applied with  
28 respect to the entire CLASS;

1 (b) A class action is superior to any other available method for the  
2 fair and efficient adjudication of the claims of the members of the CLASS because in the  
3 context of employment litigation a substantial number of individual employees will avoid  
4 asserting their rights individually out of fear of retaliation or adverse impact on their  
5 employment;

6 (c) The members of the CLASS exceed 100 people and are therefore  
7 so numerous that it is impractical to bring all members of the CLASS before the Court;

8 (d) PLAINTIFF, and the other members of the CLASS, will not be  
9 able to obtain effective and economic legal redress unless the action is maintained as a class  
10 action;

11 (e) There is a community of interest in obtaining appropriate legal  
12 and equitable relief for the acts of unfair competition, statutory violations and other  
13 improprieties, and in obtaining adequate compensation for the damages and injuries which  
14 DEFENDANT's actions have inflicted upon the CLASS;

15 (f) There is a community of interest in ensuring that the combined  
16 assets of DEFENDANT are sufficient to adequately compensate the members of the CLASS  
17 for the injuries sustained;

18 (g) DEFENDANT has acted or refused to act on grounds generally  
19 applicable to the CLASS, thereby making final class-wide relief appropriate with respect to  
20 these Classes as a whole;

21 (h) The members of the CLASS are readily ascertainable from the  
22 business records of DEFENDANT and business records of the DEFENDANT will identify  
23 and establish membership in the CLASS; and,

24 (i) Class treatment provides manageable judicial treatment calculated to  
25 bring a efficient and rapid conclusion to all litigation of all wage and hour related claims  
26 arising out of the conduct of DEFENDANT as to the members of the CLASS.

27 30. DEFENDANT maintain records from which the Court can ascertain and  
28 identify by job title each of DEFENDANT's non-exempt employees who as have been

1 systematically, intentionally and uniformly subjected to DEFENDANT's corporate policy,  
2 practices and procedures as herein alleged. PLAINTIFF will seek leave to amend the  
3 complaint to include any additional job titles of similarly situated employees when they have  
4 been identified.

5 31. DEFENDANT, as a matter of corporate policy, practice and procedure, failed  
6 to pay the members of the CLASS the wages due for all hours worked, including on-call  
7 time, and failed to correctly pay overtime compensation to the CLASS due to a systematic  
8 miscalculation. All employees in the CLASS, including the PLAINTIFF, performed the  
9 same primary functions and were paid by DEFENDANT according to uniform and  
10 systematic company procedures, which, as alleged herein above. This business practice was  
11 uniformly applied to each and every member of the CLASS, and therefore, the propriety of  
12 this conduct can be adjudicated on a class-wide basis. DEFENDANT intentionally,  
13 knowingly, and wilfully, engaged in the above described practices.

#### 14 15 JURISDICTION AND VENUE

16 32. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331,  
17 federal question jurisdiction, 29 U.S.C. § 216, the Fair Labor Standards Act, and 28 U.S.C. §  
18 1367, supplemental jurisdiction of the state law claims. Independently, this Court also has  
19 original jurisdiction over PLAINTIFF's state law class claims pursuant to the Class Action  
20 Fairness Act of 2005, 28 U.S.C. § 1332 in that the PLAINTIFF is a resident of California,  
21 most of the CLASS is comprised of residents of California, DEFENDANT is a citizen of  
22 Ohio, there are more than 100 individuals in the CALIFORNIA CLASS, and the amount in  
23 controversy in this complaint exceeds the sum or value of \$5,000,000. The action is brought  
24 pursuant to Federal Rules of Civil Procedure, rule 23. PLAINTIFF brings this action on her  
25 own behalf, and on behalf of all persons within the CLASS as herein defined.

26 33. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because  
27 DEFENDANT (i) is subject to personal jurisdiction in this District, and/or (ii) committed the  
28 wrongful conduct against certain members of the CLASS in San Diego County, California.

At all relevant times, DEFENDANT maintained offices and conducts business in San Diego County, California and committed the wrongful conduct against members of the CLASS in San Diego County, California.

**FIRST CAUSE OF ACTION**

**For Unlawful Business Practices**

**[Cal. Bus. And Prof. Code § 17200 et seq.]**

**(By PLAINTIFF and the CLASS and against All Defendants)**

34. PLAINTIFF, and the other members of the CLASS, reallege and incorporate by this reference, as though fully set forth herein, paragraphs 1 through 33 of this Complaint.

35. DEFENDANT is a "person" as that term is defined under Cal. Bus. & Prof. Code § 17021.

36. Cal. Bus. & Prof. Code § 17200 defines unfair competition as any unlawful, unfair, or fraudulent business act or practice. Section 17200 applies to violations of labor laws and in the employment context. Section 17203 authorizes injunctive, declaratory, and/or other equitable relief with respect to unfair competition as follows:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business & Professions Code § 17203.

37. At all times relevant hereto, by and through the conduct described herein, DEFENDANT have engaged in unfair and unlawful' practices by failing to pay PLAINTIFFS, and the other members of the CLASS, wages due for on-call work, failed accurately to record all hours worked, and failed to provide the required amount of overtime compensation due to a systematic miscalculation of the regular rate that cannot be justified, pursuant to the applicable Cal. Lab. Code, and Industrial Welfare Commission requirements

1 in violation of Cal. Bus. and Prof. Code § 17200 et seq., and have thereby deprived  
2 PLAINTIFF, and the other members of the CLASS, of fundamental rights and privileges  
3 and caused them economic injury as herein alleged. DEFENDANT engaged in unfair  
4 competition by withholding compensation for hours worked. DEFENDANT further  
5 engaged in unfair and unlawful business practices by failing to keep accurate information  
6 and failing to accurately calculate the overtime compensation due DEFENDANT's  
7 employees, in violation of California law. As herein alleged, DEFENDANT's conduct was  
8 unlawful in that, with respect to all California employees, DEFENDANT uniformly violated  
9 California law and regulations, including but not limited to Labor Code §201, §202, § 206.5,  
10 §216, §204, §218, §226, §226.7, §510, §512, §1102.5, §1174, §1175, §1198, and 8 C.C.R. §  
11 11040(7). DEFENDANT's conduct also violated federal law.

12 38. By and through the unfair and unlawful business practices described herein,  
13 DEFENDANT obtained valuable property, money, and services from the PLAINTIFF, and  
14 the other members of the CLASS, and deprived them of valuable rights and benefits  
15 guaranteed by law and contract, all to their detriment and to the benefit of DEFENDANT so  
16 as to allow DEFENDANT to unfairly compete against competitors who comply with the  
17 law.

18 39. All the acts described herein as violations of, among other things, the Cal.  
19 Labor Code and Industrial Welfare Commission Wage Order, are unlawful and in violation  
20 of public policy; and in addition are immoral, unethical, oppressive, and unscrupulous, and  
21 Thereby constitute unfair and unlawful business practices in violation of Cal. Bus. & Prof.  
22 Code § 17200 et seq. The conduct of the DEFENDANT was also deceptive in that  
23 DEFENDANT represented to PLAINTIFF and the members of the CLASS that they were  
24 not entitled to receive wages for on-call hours and were correctly paid overtime  
25 compensation for documented overtime hours worked.

26 40. PLAINTIFF, and the other members of the CLASS, are entitled to, and do,  
27 seek such relief as may be necessary to restore to them the money and property which  
28 DEFENDANT have acquired, or of which PLAINTIFF, and other members of the CLASS,

1 have been deprived, by means of the above described unfair and unlawful business practices.

2 41. PLAINTIFF, and the other members of the CLASS, are further entitled to, and  
3 do, seek a declaration that the above described business practices are unfair and unlawful  
4 and seek injunctive relief to enjoin DEFENDANT from engaging in any of these unfair and  
5 unlawful business practices in the future pursuant to Bus. & Prof. Code § 17203.

6 42. PLAINTIFF, and the other members of the CLASS, have no plan, speedy,  
7 and/or adequate remedy at law that will end the unfair and unlawful business practices of  
8 DEFENDANT. As a result of the unfair and unlawful business practices described above,  
9 PLAINTIFF, and the other members of the CLASS, have suffered and will continue to  
10 suffer irreparable harm unless DEFENDANT is restrained from continuing to engage in  
11 these unfair and unlawful business practices. In addition, DEFENDANT should be required  
12 to disgorge the unpaid wages to PLAINTIFF, and the other members of the CLASS.

13  
14 **SECOND CAUSE OF ACTION**

15 **For Failure To Pay Earned Wages and Overtime Compensation**

16 **[Cal. Lab. Code §§ 204, 210, 510, 1194 and 1198]**

17 **(By PLAINTIFF and the CLASS and Against all Defendants)**

18 43. PLAINTIFF, and the other members of the CLASS, reallege and incorporate  
19 by this reference, as though fully set forth herein, paragraphs 1 through 42 of this Complaint.

20 44. Cal. Lab. Code § 204 requires employers to pay employees for all hours  
21 worked as follows: "all wages... ..earned by any person in any employment are due and  
22 payable twice during each calendar month, on days designated in advance by the employer  
23 as the regular paydays." Cal. Lab. Code § 510 further provides that employees in California  
24 shall not be employed more than eight (8) hours in any workday or forty (40) hours in a  
25 workweek unless they receive additional compensation beyond their regular wages in  
26 amounts specified by law.

27 45. Cal. Lab. Code §§1194 establishes an employee's right to recover unpaid  
28 wages, including overtime compensation and interest thereon, together with the costs of suit.



1           46. As set forth herein, DEFENDANTS' policy and practice was to intentionally  
2 and uniformly deny payment of wages due for on-call time which were hours worked and  
3 failed to correctly calculate overtime compensation paid to the CLASS. This was done in an  
4 illegal attempt to avoid payment of earned wages, overtime compensation and other benefits  
5 in violation of the California Labor Code and Industrial Welfare Commission requirements.

6           47. The PLAINTIFF and the members of the CLASS are not exempt from  
7 receiving overtime compensation and other benefits under the Labor Code. The Industrial  
8 Welfare Commission, ICW Wage Order No. 4, and Labor Code §515, set forth the  
9 requirements which must be complied with to classify an employee as exempt from  
10 applicable labor laws. DEFENDANT has classified all employees in the CLASS as non-  
11 exempt and paid them compensation on an hourly basis. For an employee to be exempt from  
12 these rules as a bona fide "executive," all the following criteria must be met and  
13 DEFENDANT has the burden of proving that:

14           (a) The employee's primary duty must be management of the enterprise, or  
15 of a customarily recognized department or subdivision; and,

16           (b) The employee must customarily and regularly direct the work of at least  
17 two (2) or more other employees; and,

18           (c) The employee must have the authority to hire and fire, or to command  
19 particularly serious attention to his or his recommendations on such actions affecting other  
20 employees; and,

21           (d) The employee must customarily and regularly exercise discretion and  
22 independent judgment;

23           (e) The employee must be primarily engaged in duties which meet the test  
24 of exemption; and,

25           (f) The employee "earns a monthly salary" equivalent to no less than two  
26 times the state minimum wage for full-time employment.

27 No member of the CLASS was or is an executive because they all fail to meet the  
28 requirements of being an exempt "executive" within the meaning of Order No. 4.

1           48. The Industrial Welfare Commission, ICW Wage Order No. 4, and Labor Code  
2 §515, set forth the requirements which must be complied with to classify an employee as  
3 exempt from applicable labor laws. For an employee to be exempt from these rules as a  
4 bona fide "administrator," all the following criteria must be met and DEFENDANT has the  
5 burden of proving that:

6           (a) The employee must perform office or non-manual work directly related  
7 to management policies or general business operation of the employer; and,

8           (b) The employee must customarily and regularly exercise discretion and  
9 independent judgment; and,

10           (c) The employee must regularly and directly assist a proprietor or an  
11 exempt administrator; or,

12           (d) The employee must perform, under only general supervision, work  
13 requiring special training, experience, or knowledge, or,

14           (e) The employee must execute special assignments and tasks under only  
15 general supervision;

16           (f) The employee must be primarily engaged in duties which meet the test  
17 of exemption; and,

18           (g) The employee "earns a monthly salary" equivalent to no less than two  
19 times the state minimum wage for full-time employment.

20 No member of the CLASS was or is an administrator because they all fail to meet the  
21 requirements for being an exempt "administrator" under Order No. 4.

22           49. The Industrial Welfare Commission, ICW Wage Order No. 4, and Labor Code  
23 §515, set forth the requirements which must be complied with to classify an employee as  
24 exempt from applicable labor laws. For an employee to be exempt from these rules as a  
25 bona fide "professional," all the following criteria must be met and DEFENDANT has the  
26 burden of proving that:

27           (a) The employee is primarily engaged in an occupation commonly  
28 recognized as a learned or artistic profession. For the purposes of this subsection, "learned

1 or artistic profession” means an employee who is primarily engaged in the performance of:

2 1) Work requiring knowledge of an advanced type in a field or  
3 science or learning customarily acquired by a prolonged course of specialized intellectual  
4 instruction and study, as distinguished from a general academic education and from an  
5 apprenticeship, and from training in the performance of routine mental, manual, or physical  
6 processes, or work that is an essential part or necessarily incident to any of the above work;  
7 or,

8 2) Work that is original and creative in character in a recognized  
9 field of artistic endeavor, and the result of which depends primarily on the invention,  
10 imagination or talent of the employee or work that is an essential part of or incident to any of  
11 the above work; and,

12 3) Whose work is predominately intellectual and varied in character  
13 (as opposed to routine mental, manual, mechanical, or physical work) and is of such  
14 character cannot be standardized in relation to a given period of time.

15 (b) The employee must customarily and regularly exercise discretion and  
16 independent judgment; and.

17 (c) The employee earns a monthly salary equivalent to no less than two (2)  
18 times the state minimum wage for full-time employment.

19 No member of the CLASS was or is a professional because they all fail to meet the  
20 requirements of being an exempt “professional” within the meaning of Order No. 4.

21 50. PLAINTIFF, and other members of the CLASS, do not fit the definition of  
22 an exempt executive, administrative, or professional employee because:

23 (a) These employees do not primarily perform managerial or  
24 administrative (exempt) duties;

25 (b) Their work hours are primarily spent performing non-exempt duties,  
26 including but not limited to performing routine banking transactions as requested by  
27 customers;

28 (c) They do not have the discretion or independent judgment, in that they must

1 follow exacting and comprehensive company-wide policies and procedures which dictate  
2 every aspect of their work day;

3 (d) They do not have the authority to hire and/or fire other personnel; and/or,

4 (e) They do not earn a "monthly salary" equivalent to no less than two  
5 times the state minimum wage for full-time employment.

6 51. During the class period, the PLAINTIFF, and other members of the CLASS,  
7 worked more hours than they were paid for because of the time spent on-call under the  
8 control of the DEFENDANT, constituting a failure to pay all earned wages.

9 52. During the Class Period, the PLAINTIFF, and other members of the CLASS,  
10 worked more than eight hours in a workday, and/or more than forty hours in a work week,  
11 but the overtime compensation paid by DEFENDANT for these overtime hours was  
12 incorrectly calculated, resulting in a systematic underpayment.

13 53. At all times relevant times, DEFENDANT failed to pay PLAINTIFF, and  
14 other members of the CLASS, wages for the hours they have worked on-call as required by  
15 Cal. Lab. Code §204, and the correct overtime compensation for the hours they have worked  
16 in excess of the maximum hours permissible by law as required by Cal. Lab. Code §§ 510  
17 and 1198.

18 54. By virtue of DEFENDANT's unlawful failure to pay additional compensation  
19 to the PLAINTIFF, and the other members of the CLASS, for the hours actually worked and  
20 failure to pay the correct amount of overtime compensation, the PLAINTIFF, and the other  
21 members of the CLASS, have suffered, and will continue to suffer, an economic injury in  
22 amounts which are presently unknown to them and which will be ascertained according to  
23 proof at trial.

24 55. PLAINTIFF, and the other members of the CLASS, request recovery of wages  
25 due and the correction of overtime compensation paid according to proof, interest, and costs,  
26 as well as the assessment of any and all available statutory penalties against DEFENDANT,  
27 in a sum as provided by the Cal. Lab. Code and/or other statutes.

28 56. In performing the acts and practices herein alleged in violation of labor laws

1 and refusing to provide the requisite overtime compensation, the DEFENDANT acted and  
2 continue to act intentionally, oppressively, and maliciously toward the PLAINTIFF, and  
3 toward the other members of the CLASS, with a conscious and utter disregard of their legal  
4 rights, or the consequences to them, and with the despicable intent of depriving them of their  
5 property and legal rights and otherwise causing them injury in order to increase corporate  
6 profits at the expense of PLAINTIFF and the members of the Class.

7 57. PLAINTIFF and many of the CLASS members have terminated their  
8 employment and DEFENDANT did not timely tender payment of all wages owed as  
9 required by Cal. Labor Code §§ 201 and 202. Therefore, as provided by Cal Lab. Code §  
10 203, on behalf of the members of the CLASS who have terminated their employment,  
11 including himself, PLAINTIFF demands thirty days of pay as penalty for not paying all  
12 wages due at time of termination for all employees who terminated employment during the  
13 CLASS PERIOD and demands an accounting and payment of all wages due, plus interest.

### 14 **THIRD CAUSE OF ACTION**

#### 15 **For Failure to Provide Accurate Itemized Statements**

16 **[Cal. Lab. Code § 226]**

17 **(By PLAINTIFF and the CLASS and against DEFENDANT)**

18 58. PLAINTIFF, and the other members of the CLASS, reallege and incorporate  
19 by this reference, as though fully set forth herein, paragraphs 1 through 57 of this Complaint.

20 59. Cal. Labor Code § 226 provides that an employer must furnish employees with  
21 “an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours  
22 worked by the employee, (3) the number of piece rate units earned and any applicable piece  
23 rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all  
24 deductions made on written orders of the employee may be aggregated and shown as one  
25 item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is  
26 paid, (7) the name of the employee and his or her social security number, except that by  
27 January 1, 2008, only the last four digits of his or her social security number or an employee  
28

1 identification number other than a social security number may be shown on the itemized  
2 statement, (8) the name and address of the legal entity that is the employer, and (9) all  
3 applicable hourly rates in effect during the pay period and the corresponding number of  
4 hours worked at each hourly rate by the employee.”

5 60. At all times relevant herein, DEFENDANT violated Labor Code § 226 with  
6 respect to PLAINTIFF and the other members of the CLASS, in that DEFENDANT failed  
7 to properly and accurately itemize the gross wages earned, the net wages earned, and all  
8 applicable hourly rates in effect during the pay period and the corresponding number of  
9 hours worked at each hourly rate for these employees. This failure by DEFENDANT was  
10 the intentional result of DEFENDANT’s intentional refusal to compensate for on-call hours  
11 worked and the miscalculation of overtime compensation.

12 61. DEFENDANTS knowingly and intentionally failed to comply with Labor  
13 Code § 226, causing damages to PLAINTIFF, and the other members of the CLASS. These  
14 damages include, but are not limited to, unpaid wages for hours actually worked, the costs  
15 expended calculating the true hours worked and the amount of employment taxes which  
16 were not properly paid to state and federal tax authorities. These damages may be difficult  
17 to estimate. Therefore, PLAINTIFF, and the other members of the CLASS may recover  
18 liquidated damages of \$50.00 for the initial pay period in which the violation occurred, and  
19 \$100.00 for each violation in subsequent pay period pursuant to Labor Code § 226, in an  
20 amount according to proof at the time of trial (but in no event more than \$4,000.00 for  
21 PLAINTIFF and each respective member of the CLASS herein), plus costs, pursuant to  
22 Labor Code § 226(g).

23  
24 **FOURTH CAUSE OF ACTION**

25 **For Violation of the Fair Labor Standards Act**

26 **[29 U.S.C. § 201 et seq.]**

27 **By PLAINTIFF and the CLASS and Against All Defendants)**

28 62. PLAINTIFF, and the other members of the CLASS, reallege and incorporate



1 by this reference, as though fully set forth herein, paragraphs 1 through 61 of this Complaint.

2 63. The Fair Labor Standards Act, 29 U.S.C. §201, et seq., states that an employee  
3 must be compensated for all hours worked, including all straight time compensation and  
4 overtime compensation. 29 C.F.R. §778.223 and 29 C.F.R. §778.315. This Court has  
5 concurrent jurisdiction over claims involving the Fair Labor Standards Act pursuant to 29  
6 U.S.C. § 216.

7 64. PLAINTIFF also brings this lawsuit as a collective action under the Fair  
8 Labor and Standards Act, 29 U.S.C. § 201, et seq. (the "FLSA"), on behalf of all persons  
9 who were, are, or will be employed by DEFENDANT in a technician position, or in other  
10 substantially similar positions, during the period commencing three years prior to the filing  
11 of this Complaint and ending on the date as the Court shall determine (the "COLLECTIVE  
12 CLASS PERIOD"), who performed work in excess of forty (40) hours in one week and did  
13 not receive all compensation as required by the FLSA for the hours worked (the  
14 "COLLECTIVE CLASS") due to the miscalculation of overtime compensation and/or the  
15 exclusion of on-call hours worked. To the extent equitable tolling operates to toll claims by  
16 the COLLECTIVE CLASS against the DEFENDANT, the COLLECTIVE CLASS PERIOD  
17 should be adjusted accordingly.

18 65. Questions of law and fact common to the COLLECTIVE CLASS as a whole,  
19 but not limited to the following, include:

20 a. Whether DEFENDANT's policies and practices failed to accurately  
21 record all on-call hours worked by PLAINTIFF and the other members of the  
22 COLLECTIVE CLASS;

23 b. Whether DEFENDANT failed to adequately compensate the members  
24 of the COLLECTIVE CLASS for all hours worked as required by the FLSA;

25 c. Whether DEFENDANT correctly calculated the should be enjoined  
26 from continuing the  
27 practices which violate the FLSA; and,

28 d. Whether DEFENDANTS are liable to the COLLECTIVE CLASS.

1           66. The Fifth Cause of Action for the violations of the FLSA may be brought and  
2 maintained as an "opt-in" collective action pursuant to Section 16(b) of FLSA, 29 U.S.C.  
3 216(b), for all claims asserted by the representative PLAINTIFF of the COLLECTIVE  
4 CLASS because the claims of the PLAINTIFF are similar to the claims of the members of  
5 the prospective COLLECTIVE CLASS.

6           67. PLAINTIFF and the COLLECTIVE CLASS are similarly situated, have  
7 substantially similar job requirements and pay provisions, and are subject to  
8 DEFENDANT's common and uniform policy and practice of failing to pay for all actual  
9 time worked and wages earned, and failing to accurately record all hours worked by these  
10 employees in violation of the FLSA and the Regulations implementing the Act as enacted by  
11 the Secretary of Labor (the "REGULATIONS").

12           68. DEFENDANT is engaged in communication, business, and transmission  
13 throughout the United States and are, therefore, engaged in commerce within the meaning of  
14 29 U.S.C. § 203(b).

15           69. 29 U.S.C. § 255 provides that a three-year statute of limitations applies to  
16 willful violations of the FLSA. The conduct by the DEFENDANT which violated the FLSA  
17 was willful.

18           70. PLAINTIFF and the members of the COLLECTIVE CLASS regularly worked  
19 in excess of forty (40) hours in a workweek. Pursuant to the Fair Labor Standards Act, 29  
20 U.S.C. § 201, et seq., PLAINTIFF and the members of the COLLECTIVE CLASS are  
21 entitled to compensation for all hours actually worked, including on-call hours, and are also  
22 entitled to wages at a rate not less than one and one-half times their regular rate of pay for all  
23 hours worked in excess of forty (40) hours in any workweek, which wages were not paid  
24 because of DEFENDANT's systematic miscalculation of the regular rate.

25           71. PLAINTIFF and the COLLECTIVE CLASS were all paid by DEFENDANT  
26 on an hourly or salary basis for the hours worked up to forty (40) in a workweek, but  
27 PLAINTIFF and the COLLECTIVE CLASS worked more than forty (40) hours per  
28 workweek, and were not paid the correct compensation for the documented overtime hours

1 worked because DEFENDANT excluded certain earnings from the regular rate calculation.  
2 PLAINTIFF and the COLLECTIVE CLASS were not "exempt" from the requirements of  
3 the Fair Labor Standards Act, and DEFENDANT classifies these employees as not exempt.

4 72. For purposes of the Fair Labor Standards Act, the employment practices of  
5 DEFENDANT were and are uniform throughout California and the United States in all  
6 respects material to the claims asserted in this Complaint.

7 73. DEFENDANT violated the Fair Labor Standards Act by failing to pay hourly  
8 employees for all hours worked, including overtime hours, as alleged herein above.

9 74. As a result of DEFENDANT's failure to pay overtime compensation for hours  
10 worked at the correct regular rate, as required by the FLSA, PLAINTIFF and the members  
11 of the COLLECTIVE CLASS were damaged in an amount to be proved at trial.

12 75. PLAINTIFF, therefore, demands that they and the members of the  
13 COLLECTIVE CLASS be paid overtime compensation as required by the FLSA for every  
14 hour of overtime worked in any work week for which they were not correctly compensated,  
15 plus liquidated damages, interest and statutory costs as provided by law.

16  
17  
18 **PRAYER**

19 WHEREFOR, PLAINTIFF prays for judgment against each Defendant, jointly and  
20 severally, as follows:

21 1. On behalf of the CLASS:

- 22 A) That the Court certify action asserted by the CLASS as a class action pursuant  
23 to Federal Rules of Civil Procedure, rule 23;  
24 B) An order temporarily, preliminarily and permanently enjoining and restraining  
25 DEFENDANT from engaging in similar unlawful conduct as set forth herein;  
26 C) An order requiring DEFENDANT to pay all wages and all sums unlawfully  
27 withheld from compensation due to PLAINTIFF and the other members of the  
28 CLASS; and,

- 1 D) Disgorgement of DEFENDANT's ill-gotten gains into a fluid fund for
- 2 restitution of the sums incidental to DEFENDANT's violations due to
- 3 PLAINTIFF and to the other members of the CLASS.
- 4 E) Compensatory damages, according to proof at trial, including compensatory
- 5 damages for both regular and overtime compensation due PLAINTIFF and the
- 6 other members of the CLASS according to proof, during the applicable
- 7 CLASS PERIOD plus interest thereon at the statutory rate;
- 8 F) The wages of all terminated employees due to members of the CLASS as a
- 9 penalty from the due date thereof at the same rate until paid or until an action
- 10 therefor is commenced in accordance with Cal. Lab. Code § 203;
- 11 G) The greater of all actual damages or fifty dollars (\$50) for the initial pay
- 12 period in which a violation occurs and one hundred dollars (\$100) per each
- 13 member of the CLASS for each violation in a subsequent pay period, not
- 14 exceeding an aggregate penalty of four thousand dollars (\$4,000), and an
- 15 award of costs for violations of Cal. Lab. Code § 226.

16 2. On behalf of the COLLECTIVE CLASS:

- 17 A) That the Court certify the Fifth Cause of Action asserted by the
- 18 COLLECTIVE CLASS as an opt-in class action under 29 U.S.C. § 216(b);
- 19 B) That the Court declare the rights and duties of the parties consistent with the
- 20 relief sought by PLAINTIFF;
- 21 C) Issue a declaratory judgment that DEFENDANT's acts, policies, practices and
- 22 procedures complained of herein violated provisions of the Fair Labor
- 23 Standards Act;
- 24 D) That DEFENDANT be enjoined from further violations of the Fair Labor
- 25 Standards Act;
- 26 E) That the PLAINTIFF and the members of the COLLECTIVE CLASS recover
- 27 compensatory, damages and an equal amount of liquidated damages as
- 28 provided under the law and in 29 U.S.C. § 216(b).

1 3. On all claims:

2 A) An award of interest, including prejudgment interest at the legal rate.

3 B) An award of liquidated damages, statutory damages, cost of suit, but neither  
4 this prayer nor any other allegation or prayer in this Complaint is to be  
5 construed as a request, under any circumstance, that would result in a request  
6 for attorneys' fees under Cal. Lab. Code § 218.5;

7 C) Such other and further relief as the Court deems just and equitable.

8 Dated: August 28 2009

BLUMENTHAL, NORDREHAUG &  
BHOWMIK

9  
10 By. 

Norman B. Blumenthal  
Attorneys for Plaintiff

11  
12 UNITED EMPLOYEES LAW GROUP  
13 Walter Haines, Esq.  
14 65 Pine Ave, #312  
15 Long Beach, CA 90802  
16 Telephone: (562) 256-1047  
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28

**DEMAND FOR JURY TRIAL**

PLAINTIFF demands a jury trial on issues triable to a jury.

Dated: August 28 2009

BLUMENTHAL, NORDREHAUG &  
BHOWMIK

By: 

Norman B. Blumenthal  
Attorneys for Plaintiff

UNITED EMPLOYEES LAW GROUP  
Walter Haines, Esq.  
65 Pine Ave, #312  
Long Beach, CA 90802  
Telephone: (562) 256-1047  
Facsimile: (562) 256-1006

K:\D\NBB\Francisco v. Diebold\p-Complaint-FINAL.wpd



ORIGINAL  
JS 44 (Rev. 12/07)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

JULIUS FRANCISCO

(b) County of Residence of First Listed Plaintiff Los Angeles County  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Norman Blumenthal, Blumenthal, Nordrehaug & Bhowmik,  
2255 Calle Clara, La Jolla, CA, 92037, (858)551-1223

## DEFENDANTS

DIEBOLD, INCORPORATED

County of Residence of First Listed Defendant CLERK U.S. DISTRICT COURT  
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

09 CV 1889 WQH WMC

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROFESSIONAL RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
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## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity.)  
29 U.S.C. § 216(b) (Fair Labor Standards Act) and 28 U.S.C. § 1332 (CAFA Jurisdiction)

Brief description of cause:

Claims for unpaid overtime compensation under Federal and California law

## VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☒ DEMAND \$ 5,000,000.00CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/28/2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

4678

AMOUNT

350.

APPLYING IFP

JUDGE

MAG. JUDGE

OK

8/28/09

Court Name: USDC California Southern  
Division: 3  
Receipt Number: CAS004670  
Cashier ID: sramirez  
Transaction Date: 08/28/2009  
Payer Name: BLUMENTHAL

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CIVIL FILING FEE  
For: FRANCISCO V. DIEBOLD  
Case/Party: D-CAS-3-09-CV-001889-001  
Amount: \$350.00

-----  
CHECK  
Check/Money Order Num: 12045  
Amt Tendered: \$350.00

-----  
Total Due: \$350.00  
Total Tendered: \$350.00  
Change Amt: \$0.00

There will be a fee of \$45.00  
charged for any returned check.